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TRADE AND DEVELOPMENT BOARD
Commission on Investment, Technology and Related Financial Issues
Expert Meeting on Experiences with Bilateral and
Regional Approaches to Multilateral Cooperation
in the Area of Long-term Cross-border Investment,
Particularly Foreign Direct Investment
Geneva, 10–12 June 2002
Item 2 of the provisional agenda

PROVISIONAL AGENDA AND ANNOTATIONS

I. Provisional agenda

1. Election of officers

2. Adoption of the agenda

3. Experiences with bilateral and regional approaches to multilateral cooperation in the area of long-term cross-border investment, particularly foreign direct investment

4. Adoption of the report of the meeting

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II. Annotations to the provisional agenda

Item 1: Election of officers

1. It is recommended that the Expert Meeting elect a Chairperson and a Vice-Chairperson-cum-Rapporteur.

Item 2: Adoption of the agenda

2. The provisional agenda for the meeting is in section I above. A detailed programme will be available one week before the meeting.

Documentation

TD/B/COM.2/EM.11/1 Provisional agenda and annotations

Item 3: Experiences with bilateral and regional approaches to multilateral cooperation in the area of long-term cross-border investment, particularly foreign direct investment

3. The Commission on Investment, Technology and Related Financial Issues decided to convene an Intergovernmental Expert Group Meeting on Experiences with Bilateral and Regional Approaches to Multilateral Cooperation in the Area of Long-term Cross-border Investment, Particularly Foreign Direct Investment within the framework of the Commission on Investment, Technology and Related Financial Issues.

4. This Expert Meeting could shed light on the issue of the implications of closer multilateral cooperation in the area of cross-border investment, particularly foreign direct investment (FDI), for the development policies and objectives of developing countries. More specifically, the Meeting will undertake a stocktaking of common elements and experiences with bilateral and regional approaches and other initiatives in this area, and outline the challenges that have emerged in negotiations and approaches. It will also focus on the evolution of these approaches in the national, regional and international context, with a view to highlighting common and different elements in them and addressing how the development dimension has been and could be taken into account.

5. To facilitate the discussions, the UNCTAD secretariat has prepared an issues note on Experience with Bilateral and Regional Approaches to Multilateral Cooperation in the Area of Long-term Cross-border Investment, Particularly Foreign Direct Investment (TD/B/COM.2/EM.11/2). In addition, experts are encouraged to prepare brief papers on the subject under discussion. These papers will be made available at the meeting in the form and language in which they are received.

Documentation

TD/B/COM.2/EM.11/2	"Experience with bilateral and regional approaches to multilateral cooperation in the area of long-term cross-border investment, particularly foreign direct investment". Issues note by the UNCTAD secretariat

Item 4: Adoption of the report of the meeting

6. The report of the Expert Meeting will be submitted to the Commission on Investment, Technology and Related Financial Issues at its next session. The Expert Meeting may wish to authorize the Rapporteur, under the authority of the Chairperson, to prepare the final report after the conclusion of the meeting.

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Commission on Investment, Technology and Related Financial Issues
Expert Meeting on Experiences with Bilateral and
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in the Area of Long-term Cross-border Investment,
Particularly Foreign Direct Investment
Geneva, 12–14 June 2002
Item 2 of the provisional agenda

PROVISIONAL AGENDA AND ANNOTATIONS

Corrigendum

The cover page of document TD/B/COM.2/EM.11/1 wrongly gave the dates of the Expert Meeting as 10–12 June 2002. The correct dates are 12–14 June 2002

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Expert Meeting on Experiences with Bilateral and Regional
Approaches to Multilateral Cooperation in the Area of Long-Term
Cross-Border Investment, particularly Foreign Direct Investment
Geneva, 12 - 14 June 2002
Item 3 of the provisional agenda

EXPERIENCES WITH BILATERAL AND REGIONAL APPROACHES TO MULTILATERAL COOPERATION IN THE AREA OF LONG-TERM CROSS-BORDER INVESTMENT, PARTICULARLY FOREIGN DIRECT INVESTMENT

Note by the UNCTAD secretariat

EXECUTIVE SUMMARY

International rule-making on investment issues is multifaceted and spans the bilateral, regional, interregional and multilateral levels. It has taken the form of binding or voluntary instruments setting out a number of commitments that vary in strength and has taken place against a background of significant autonomous liberalization of investment regimes. Recent BIT practice tends to reaffirm the traditional role of BITs, which provide investment protection and generally guarantee non-discriminatory treatment after investment has been established in host countries. The universe of regional instruments on investment or containing investment rules (RIAs) is not of the same magnitude as the BIT universe, but is still vast and diverse. While BITs have a distinct focus on investment protection, RIAs are generally geared towards liberalization, even though an important number of them also address protection issues. The role of BITs in respect to specific development commitments lies primarily in the contribution they can make to promote investment by helping to secure a welcoming and stable environment for foreign investment. At the same time, they allow considerable latitude for the application of national law and policy, thus providing developing countries with flexibility to pursue their individual policy objectives. Some RIAs have adopted development-oriented provisions including various exceptions; safeguards and transition periods that are meant to cater for the different objectives and needs of parties at different levels of development.

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INTRODUCTION

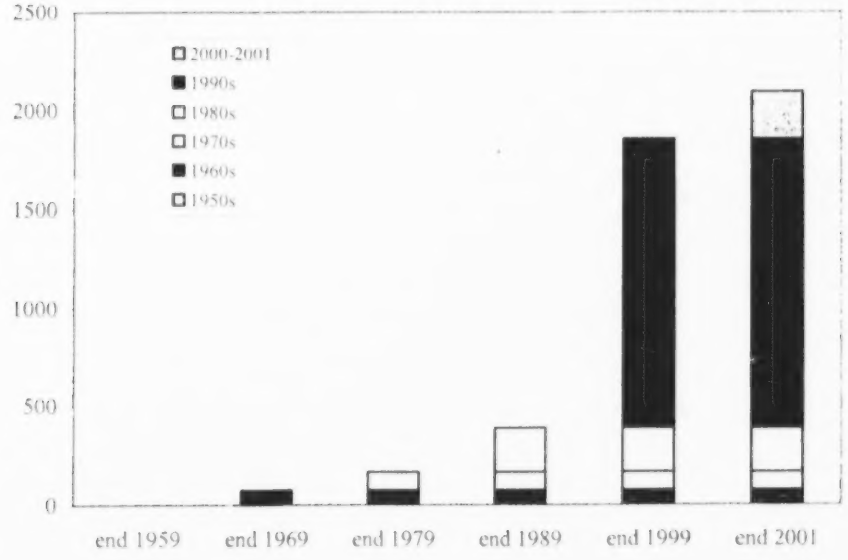
1. The Commission on Investment, Technology and Related Financial Issues, at its sixth session (21 - 25 January 2002), decided to convene an intergovernmental Expert Meeting on Experience with Bilateral and Regional Approaches to Multilateral Cooperation in the Area of Long-Term Cross-Border Investment, particularly Foreign Direct Investment. The Commission considered that, in light of the Doha Ministerial Declaration, this Expert Meeting could shed light on the issue of the implications of closer multilateral cooperation in the area of cross-border investment, particularly foreign direct investment, for the development policies and objectives of developing countries. More specifically, the Meeting will undertake a stocktaking of common elements and experiences with bilateral and regional approaches and other initiatives in this area, and outline the challenges that have emerged in negotiations and approaches. It will also focus on the evolution of these approaches in the national, regional and international contexts, with a view to highlighting common and different elements in them and addressing how the development dimension has been and could be taken into account.

2. International rule-making on investment issues is multifaceted and spans the bilateral, regional, interregional and multilateral levels. It has taken the form of binding or voluntary instruments setting out a number of commitments, which vary in strength, and it has taken place against a background of significant autonomous liberalization of investment regimes in virtually all developing countries. This note reviews bilateral approaches (especially bilateral investment treaties) and regional investment instruments (RIAs), examining, first, the commonalities between instruments, secondly, the main differences between them and, third, trends over the past five to ten years. It then briefly discusses issues related to the development dimension of these agreements.

I. BILATERAL APPROACHES

3. Originally, investment issues between States were addressed in broad bilateral agreements, of which the treaties of friendship, commerce and navigation were typical. Since 1959, specialized treaties – bilateral investment treaties (BITs) – have emerged as the principal instruments for this purpose.[1] Since the adoption of the first BIT in 1959, the number of such treaties grew steadily to 385 by the end of 1989 and had jumped to 2,096 by the end of 2001 (figures 1 and 2).[2] The BIT network grew rapidly in the 1990s, as more developing countries and economies in transition signed treaties with a wider range of developed countries and started to sign BITs between themselves. The number of countries and territories involved in the conclusion of BITs also grew to reaching 174 at the end of 2001.[3]

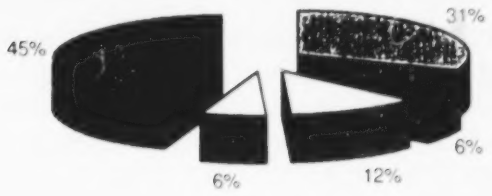
Figure 1. Growth of the number of BITs, 1959-2001



Source: UNCTAD database on BITs.

[1] For a survey of the network of BITs see UNCTAD, (2000a), for a discussion of BITs see UNCTAD, (1998).
[2] Countries have also been concluding agreements for the avoidance of double taxation, the number of which had reached 2,118 by the end of 2000. These address, among other things, the allocation of taxable income, including with a view to reducing the incidence of double taxation.
[3] A number of model BITs are reproduced in several volumes of *International Investment Instruments: A Compendium* (UNCTAD, 1996, 2000b and 2001).

Figure 2. BITs concluded in 2001, by country group



Source: UNCTAD database on BITs.

- Between developed countries and developing countries
- Between developed countries and countries of Central and Eastern Europe
- Between countries of Central and Eastern Europe and developing countries
- Between countries of Central and Eastern Europe
- Between developing countries

4. During the past few years, there appears to have been however a certain return to the practice of dealing with investment issues in other instruments as well, notably in bilateral free trade agreements (which appear to be increasingly becoming free investment agreements as well) and in association agreements of the European Union.[4] These agreements often go beyond BITs by including liberalization provisions. This section focuses on BITs since they are still the dominant form of bilateral agreements dealing with investment issues.

A. Similarities

5. A distinctive feature of BITs is that their overall format, substantive scope and content have remained largely unchanged over the past 40 years. Their main provisions typically deal with the scope and definition of foreign investment and investor; admission of investment; national and most-favoured-nation (MFN) treatment; fair and equitable treatment; legal protection in respect of expropriation and free transfer of funds and repatriation of capital and profits; and dispute-settlement provisions, both State-to-State and investor-to-State. However, the formulations of individual provisions remain rather varied. In particular, there are important differences between the language of BITs signed some decades ago and the more recent ones.

6. As far as similarities in the substantive provisions of BITs are concerned, the following observations can be made:

[4] A number of these agreements are reproduced in several volumes of *International Investment Instruments: A Compendium* (UNCTAD, 1996, 2000b, 2001)

- They typically use an asset-based definition of investment that is broad and open-ended, covering tangible and intangible assets, and direct as well as portfolio investment; it generally applies to existing as well as new investments. But there are also BITs that include narrower definition, e.g. by focussing on foreign direct investment (FDI) only.

- The entry and the establishment of investment are encouraged, although in most BITs they are subject to the national law of the host country.

- Investment promotion is weak and based mainly on providing strong protection standards that, in turn, are expected to create a favourable investment climate.

- Most BITs provide for a series of standards of treatment once an investment has been established. In current practice, these include national treatment and MFN treatment, which are typically defined as "treatment no less favourable than ...". There are also a number of standardized exceptions to these treatments relating to taxation instruments and to special privileges granted by reason of the countries' membership of free trade areas and regional integration frameworks. Also common in BIT practice are standards of fair and equitable treatment, full protection and security, and prohibition of arbitrary and discriminatory measures.

- In current BITs, the terms "expropriation" and "nationalization" include, explicitly or implicitly, measures tantamount or equivalent to expropriation. Hence, they are understood to apply the expropriation provisions to "indirect" expropriations and "creeping" expropriations. Most BITs adopt the traditional rule of international law that a State may not expropriate the property of an alien except for a public purpose, in a non-discriminatory manner, in accordance with due process of law and upon payment of compensation.

- The great majority of BITs has a provision on the transfer of payments. Current BITs guarantee the free transfer of payments related to, or in connection with, an investment. They often include a list of the types of payments covered by the transfer provisions. In some instances, BITs include an exception on a temporal basis for balance-of-payments considerations.

- BITs include provisions for the resolution of disputes between a State and investors of the other State, and between the States parties to the treaty. With regard to disputes between a host country and investors of the other party, many BITs provide for recourse to agreed international dispute-settlement mechanisms. While there are several variations in current practise, the general trend is to give investors a choice of arbitral mechanisms through institutions such as the International Centre for Settlement of Investment Disputes and the affiliated Additional Facility, the International Chamber of Commerce or various regional arbitration centres. The methods and procedures for resolving disputes between States parties to BITs involving the application of the treaty are typically spelt out in a rather elaborate set of provisions.

B. Differences

7. The main differences among the most common substantive provisions of BITs include the following:

■ Some countries' BIT practice (notably that of Canada and the United States) goes beyond that of most other BITs by providing that host countries grant the better of MFN and national treatment with regard to entry and establishment of investments. The right is qualified by a list of exceptions. This means that, subject to exceptions agreed in the treaty, host countries have to treat, with respect to admission, potential investors in the same manner as they treat their own investments or those from other countries. Thus, in contradistinction to general BIT practice, this approach brings about the liberalization of investment entry and establishment through the granting of national and MFN treatment, subject to agreed exceptions.

■ Some BITs do not grant the national treatment standard. The coverage of national treatment obligations may also vary depending on exceptions relating to public order and national security. Specific exceptions to national treatment may also be granted to allow for special treatment (e.g. incentives) to be provided to local companies or on a sectoral basis.

■ Some BITs (notably in current Canada and United States practice) include prohibition or discouragement of certain types of performance requirements. Prohibition, however, does not normally preclude the granting of some specific types of incentives to obtain a certain performance by foreign investors.

■ In spite of a high degree of consistency in BIT practice concerning the settlement of disputes, some BITs make the availability of investor - State dispute settlement conditional upon the prior exhaustion of local remedies.

■ A number of recent BITs include general exceptions (e.g. cultural exceptions, sectoral exceptions or exclusion of certain types of investments, such as portfolio transactions) which limit the substantive scope of the treaty.

■ A few recent BITs include a provision allowing for national measures aimed at protecting the environment.

C. Changes over time

8. In spite of many variations, the principal constituent elements of BITs have become rather uniform over the years. In essence, recent BIT practice tends to reaffirm the traditional role of BITs, which is to provide for international protection and, generally, guarantees of non-discriminatory treatment after investments have been established. Initiatives to include liberalization provisions – especially as regards the entry and establishment of investments – do not appear to have been emulated in recent BITs by other countries, allowing host countries to design their investment policies in accordance with their needs, level of development and their development priorities. Similarly, the initiative to include a clause explicitly addressing certain performance requirements (usually to prohibit them) appears not

to have been, in the main, pursued in the new BITs signed by other countries. Of course, this does not mean that these other countries are not interested in investment liberalization issues; rather, it suggests that they prefer to use other instruments to address these issues.

9. An issue that lingers on from traditional BIT practice and has not been addressed in many of the new BITs is the possibility of strengthening the promotion provisions of these treaties with more explicit and concrete commitments. In conclusion, it should be noted that what might be acceptable to a country at the bilateral level, may not necessarily be acceptable in the same formulation at the regional level.

D. Questions

10. Against this background, a number of questions present themselves for consideration:

- How important are BITs for investors? What is the degree of comfort provided by BITs to foreign investors in terms of safety and security of their investments? What has been the experience with them? To what extent has recourse been had to them?

- What are the implications of the evolving discussions in the area of expropriation for the right of countries, and especially developing countries, to regulate matters related to foreign investment?

- Are the similarities described above indeed the principal similarities amongst BITs? Are there any other noteworthy differences? Are there any other trends that have emerged?

- Are any implications emerging from the growth pattern of BITs?

- Do the objectives, format, scope and substantive content of BITs adequately address key concerns of host and home countries in the area of foreign investment? What additional provisions would make investors more comfortable about undertaking investments? To what extent would it be useful to address issues that do not currently figure explicitly in BITs? Are there any issues that would need to be addressed in a different manner?

- What are the similarities, differences and trends in bilateral treaties other than BITs in terms of addressing investment issues?

- To what extent and in what manner are BITs (and other bilateral treaties) influencing the elaboration of international investment rules at the regional and multilateral levels?

II. REGIONAL APPROACHES

11. The universe of regional instruments on investment or containing investment rules (RIAs) is not of the same magnitude as the BIT universe, but is still vast and diverse (annex table). The regional agreements addressing investment issues that are growing fastest in terms of numbers are those generally referred to as free trade agreements and regional integration frameworks.[5] By 2000, the number of such agreements had already exceeded 170.[6] NAFTA, the MERCOSUR Protocols and the COMESA Treaty are examples. An increasing number of these agreements include investment provisions, as do several other regional agreements that do not aim specifically at regional integration. However, only a few instruments are entirely devoted to investment, such as the Framework Agreement on the ASEAN Investment Area, and the Andean Community's Decision 291 (adopted in 1991).[7] The main aim of these agreements is typically to liberalize investment transactions and avoid discriminatory treatment amongst the countries participating in the regional scheme. Increasingly, they also include legal protection standards and promotional measures.

12. In addition, some regional groups have also developed common regimes for investments with third countries. For example, the Cotonou Agreement between the European Union and the group of African, Caribbean and Pacific (ACP) countries contains investment principles aimed at promoting European investment in the ACP countries.

A. Similarities

13. In spite of the great variety of RIAs, some common elements can be discerned. Regarding the definition of investment, some older agreements, such as the OECD Codes of Liberalisation of Capital Movements and Current Invisible Transactions, use a narrow enterprise-based type of definition. The new generation of agreements aimed at the liberalization of investment tend to use broad and inclusive definitions, although they often exclude certain transactions (e.g. the ASEAN Investment Area excludes portfolio transactions). Provisions on investment promotion can be found in several RIAs. A large number of RIAs include provisions on the free transfer of funds related to investments. Similarly, exceptions for balance-of-payments considerations are included in a growing number of RIAs. In so far as dispute resolution is concerned, some RIAs provide for the possibility of settling disputes by means of consultation and negotiation, whereas others provide for consultation through the body (e.g. the cooperation or association council) entrusted with the monitoring and implementation of the specific agreement. A number of RIAs contain detailed rules that provide for international arbitration of disputes between a party and an investor of another party.

B. Differences

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[5] For the purpose of this note, regional free trade agreements also include bilateral free trade agreements, since both types of agreements share essentially the same broad characteristics and objectives, their main difference being the number of countries involved.

[6] See WTO, (2000). Relevant investment clauses are reproduced in several volumes of *International Investment Instruments: A Compendium* (UNCTAD, 1996, 2000b, 2001).

[7] These agreements – as well as those mentioned below – are reproduced in several volumes *of International Investment Instruments: A Compendium* (UNCTAD, 1996, 2000b, 2001).

14. The issue of entry and establishment of investment in RIAs is addressed in a variety ways, with a number of recent RIAs granting national and MFN treatment upon entry, often subject to sectoral and other exceptions. Some RIAs go further to provide a right of establishment. Some RIAs include a system of reporting of existing regulations and changes thereof to ensure transparency of measures. Some also include provisions to monitor compliance.

15. RIAs also tend to differ in their provisions relating to performance requirements, with some addressing them in detail. There are also differences with regard to the types of requirements covered and their treatment. With regard to investment promotion issues, the treatment is varied: some instruments address a wide array of promotional measures, while other instruments are silent on the matter. A number of RIAs include protection standards, following the BIT provisions in this area. Finally, the range of investment-related issues covered at this level varies considerably among agreements. In addition to agreements devoted solely to one issue (e.g. illicit payments, competition), an increasing number of RIAs include provisions on investment – related issues such as environmental protection, competition, transfer of technology, employment, incentives and conflicting requirements.

C. Changes over time

16. RIAs have multiplied in number and are increasingly addressing investment issues. As such they have created an intricate web of commitments. While BITs focus on investment protection, and generally, non-discriminatory treatment, RIAs are generally geared towards liberalization, even though a substantial number of them also address protection and treatment.

17. A new issue that appears to be emerging (and that is largely absent from BITs) concerns provisions for monitoring mechanisms to follow up on commitments. They typically include corresponding obligations on countries to provide information.

D. Questions

18. Against this background, a number of questions present themselves for consideration:

■ Are the similarities described above indeed the principal similarities amongst RIAs? Are there any other noteworthy differences? Are there any other trends that deserve attention?

■ To what extent have recent RIAs influenced BIT practice, and vice versa? What are the main areas of convergence and divergence between these two processes? What are the reasons for the differences between BITs and RIAs? Are there any significant inconsistencies?

■ What has been the experience with investment liberalization effected by RIAs? Has the actual liberalization negotiated through RIAs been significant?

■ How much liberalization of investment regimes is due to RIAs as opposed to autonomous liberalization? Have the two processes been mutually reinforcing? Have RIAs locked in autonomous liberalization and ensured policy stability?

■ Beyond the improved market access opportunities generally created by RIAs, what has been the impact of RIA-induced liberalization on promoting FDI in RIA signatories? What has been the experience with national treatment at the pre-establishment phase?

■ Would it be important to address issues that do not currently figure prominently in most RIAs? If so, which ones are they?

III. THE DEVELOPMENT DIMENSION

19. The specific development commitments of BITs remain very limited. The role of BITs in this respect lies primarily in the contribution they can make to promoting investment by helping to secure a welcoming and stable environment for foreign investment. At the same time, they allow considerable latitude for the application of national law and policy – especially as regards the admission of foreign investment, the imposition of operational conditions and the granting of incentives – thus providing developing countries with flexibility to pursue their individual policy objectives. They also contain exceptions to general principles (e.g. for balance-of-payments considerations) which address developmental concerns. However, as current BIT practice stands, they do not in general contain provisions that provide for active measures regarding such matters as transfer of technology, technical cooperation, or specific home country commitments.

20. By contrast, some RIAs have explicitly adopted development-oriented provisions. These include various exceptions, safeguards and transition periods that are meant to cater to the different objectives and needs of parties at different levels of development. These qualifications may apply to all substantive provisions and have a particular importance with regard to the standards of treatment, both pre- and post-entry. A special category of exceptions also affects the repatriation of funds. Another set of development-related provisions refers to investment promotion and facilitation.

21. A number of RIAs contain significant provisions for the exchange of information with regard to investment opportunities. Possibly the most extensive provisions on investment promotions are included in the 2000 Cotonou Agreement, which builds on the provisions of the previous Lomé Conventions.

22. Against this background, a number of questions present themselves for consideration:

■ Are there certain development objectives for host developing countries that are typically not covered by BITs but should be? Is there any need to do more in BITs on investment promotion issues? Does the provision in most BITs that investments are permitted in

accordance with the laws and regulations of host countries offer adequate flexibility for developing countries to pursue their development objectives?

- Are the "flexibility" mechanisms provided for in RIAs (e.g. exceptions, waivers, transition periods, safeguards) sufficient to enable host developing countries to pursue their development strategies and benefit most from foreign investment?

- Is the attention devoted in RIAs to investment promotion issues sufficient?

- What has been the experience with RIAs in terms of providing regional content in investments within the region? How have they contributed to regional integration and development?

- What can be done to enhance the development potential of BITs, other bilateral treaties addressing investment issues and RIAs? Do home country measures and investor obligations need to be addressed?

CONCLUSION

23. Many questions of relevance to the development dimension of investment rules remain to be explored. Also there is a need for further clarification of the interrelationship between existing standards of investment liberalization, protection and promotion and the best means by which development concerns can be expressed and reflected in the evolution of international investment agreements. In this regard, it may be useful to seek inspiration from voluntary instruments developed by non-governmental organizations, corporations, and other groups that are of direct relevance to the proper functioning of foreign investment relations.

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Annex table. Main regional and interregional instruments dealing with FDI, 1957-2002

Year[b]	*Title*	*Setting*	*Level*	*Form*	*Status*
1957	Treaty Establishing the European Economic Community	European Economic Community	Regional	Binding	Adopted
1957	Agreement on Arab Economic Unity	Council of Arab Economic Unity	Regional	Binding	Adopted
1961	Code of Liberalisation of Capital Movements	OECD	Regional	Binding	Adopted
1961	Code of Liberalisation of Current Invisible Operations	OECD	Regional	Binding	Adopted
1963	Model Tax Convention on Income and on Capital	OECD	Regional	Model	Adopted
1965	Common Convention on Investments in the States of the Customs and Economic Union of Central Africa	Customs and Economic Union of Central Africa	Regional	Binding	Adopted
1967	Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade	OECD	Regional	Non-binding	Adopted
1967	Draft Convention on the Protection of Foreign Property	OECD	Regional	Non-binding	Not adopted
1969	Agreement on Andean Subregional Integration	Andean Common Market	Regional	Binding	Adopted
1969	Agreement Establishing an Association between the European Economic Community and the Malagasy States	European Community - Malagasy States	Interregional	Binding	Adopted
1969	Agreement Establishing an Association between the European Economic Community and the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya	European Community - Tanzania, Uganda and Kenya	Interregional	Binding	Adopted
1970	Agreement on Investment and Free Movement of Arab Capital among Arab Countries	Arab Economic Unity	Regional	Binding	Adopted

1970	Decision No. 24 of the Commission of the Cartagena Agreement: Common Regulations Governing Foreign Capital Movement, Trade Marks, Patents, Licenses and Royalties	Andean Common Market	Regional	Binding	Superseded
1971	Convention Establishing the Inter-Arab Investment Guarantee Corporation	Inter-Arab Investment Guarantee Corporation	Regional	Binding	Adopted
1972	Joint Convention on the Freedom of Movement of Persons and the Right of Establishment in the Central African Customs and Economic Union	Central African Customs and Economic Union	Regional	Binding	Adopted
1973	Agreement on the Harmonisation of Fiscal Incentives to Industry	Caribbean Common Market	Regional	Binding	Adopted
1973	Treaty Establishing the Caribbean Community	Caribbean Community	Regional	Binding	Adopted
1975	The Multinational Companies Code in the UDEAC	Customs and Economic Union of Central Africa	Regional	Binding	Adopted
1976	Declaration on International Investment and Multinational Enterprises	OECD	Regional	Binding/ non-binding[c]	Adopted
1979	ECOWAS Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment	Economic Community of West African States	Regional	Binding	Adopted
1980	Cooperation Agreement between the European Community and Indonesia, Malaysia, the Philippines, Singapore and Thailand, member countries of the Association of South-East Asian Countries	ASEAN - EC	Interregional	Binding	Adopted
1980	Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data	OECD	Regional	Non-binding	Adopted
1980	Unified Agreement for the Investment of Arab Capital in the Arab States	League of Arab States	Regional	Binding	Adopted
1980	Treaty Establishing the Latin American Integration Association (LAIA)	LAIA	Regional	Binding	Adopted

1981	Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data	Council of Europe	Regional	Binding	Adopted
1981	Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference	Islamic Conference	Regional	Binding	Adopted
1981	Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States	Preferential Trade Area for Eastern and Southern African States	Regional	Binding	Adopted
1982	Community Investment Code of the Economic Community of the Great Lakes Countries (CEPGL)	CEPGL	Regional	Binding	Adopted
1983	Treaty for the Establishment of the Economic Community of Central African States	Economic Community of Central African States	Regional	Binding	Adopted
1984	ECOWAS Protocol A/P1/11/84 Relating to Community Enterprises	Economic Community of West African States	Regional	Binding	Adopted
1985	ECOWAS Supplementary Protocol A/Sp.1/7/85 on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment	Economic Community of West African States	Regional	Binding	Adopted
1985	Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America	Israel - United States	Bilateral	Binding	Adopted
1985	Declaration on Transborder Data Flows	OECD	Regional	Non-binding	Adopted
1986	ECOWAS Supplementary Protocol A/Sp.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment	Economic Community of West African States	Regional	Binding	Adopted
1987	Agreement for the Establishment of a Regime for CARICOM Enterprises	Caribbean Common Market	Regional	Binding	Adopted
1987	Revised Basic Agreement on ASEAN Industrial Joint Ventures	ASEAN	Regional	Binding	Adopted

1987	An Agreement Among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments	ASEAN	Regional	Binding	Adopted
1988	Free Trade Agreement between Canada and the United States of America	Canada - United States	Bilateral	Binding	Adopted
1989	Fourth ACP-EEC Convention of Lome	African, Caribbean and Pacific countries - European Community	Interregional	Binding	Adopted
1989	Cooperation Agreement between the European Economic Community, of the one part, and the countries parties to the Charter of the Cooperation Council for the Arab States of the Gulf (the State of the United Arab Emirates, the State of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, the State of Qatar and the State of Kuwait) of the other part	Arab States of the Gulf - European Community	Interregional	Binding	Adopted
1990	Charter on a Regime of Multinational Industrial Enterprises (MIEs) in the Preferential Trade Area for Eastern and Southern African States	Preferential Trade Area for Eastern and Southern African States	Regional	Binding	Adopted
1990	ECOWAS Supplementary Protocol A/Sp.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment	Economic Community of West African States	Regional	Binding	Adopted
1991	Treaty Establishing the African Economic Community	African Economic Community	Regional	Binding	Adopted
1991	Decision 285 of the Commission of the Cartagena Agreement Rules and Regulations for Preventing or Correcting Distortions in Competition Caused by Practices that Restrict Free Trade Competition	Andean Community	Regional	Binding	Adopted
1991	Decision 291 of the Commission of the Cartagena Agreement Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licenses and Royalties	Andean Community	Regional	Binding	Adopted

1991	Decision 292 of the Commission of the Cartagena Agreement: Uniform Code on Andean Multinational Enterprises	Andean Community	Regional	Binding	Adopted
1992	Agreement on the European Economic Area	EC - EFTA	Regional	Binding	Adopted
1992	Articles of Agreement of the Islamic Corporation for the Insurance of Investment and Export Credit	Islamic Conference	Regional	Binding	Adopted
1992	North American Free Trade Agreement	Canada, Mexico and the United States	Regional	Binding	Adopted
1993	Framework Cooperation Agreement between the European Economic Community and the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama	EC - Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama	Interregional	Binding	Adopted
1993	Revised Treaty of the Economic Community of West African States (ECOWAS)	Economic Community of West African States	Regional	Binding	Adopted
1993	Framework Agreement for Cooperation between the European Economic Community and the Cartagena Agreement and its Member Countries, namely the Republic of Bolivia, the Republic of Colombia, the Republic of Ecuador, the Republic of Peru and the Republic of Venezuela	EC - Andean Community	Interregional	Binding	Adopted
1993	Treaty Establishing the Common Market for Eastern and Southern Africa	Common Market for Eastern and Southern Africa	Regional	Binding	Adopted
1994	Free Trade Agreement between Mexico and Costa Rica	Mexico – Costa Rica	Bilateral	Binding	Adopted
1994	Treaty on Free Trade between the Republic of Colombia, the Republic of Venezuela and the United Mexican States	Colombia, Venezuela and Mexico	Regional	Binding	Adopted
1994	Protocol of Colonia for the Reciprocal Promotion and Protection of Investments in the MERCOSUR	MERCOSUR	Regional	Binding	Adopted
1994	Protocol on Promotion and Protection of Investments from States not Parties to MERCOSUR	MERCOSUR	Regional	Binding	Adopted

1994	Agreement Among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment	Caribbean Community	Regional	Binding	Adopted
1994	Recommendation of the OECD Council on Bribery in International Business Transactions	OECD	Regional	Non-binding	Adopted
1994	Free Trade Agreement of the Group of Three	Colombia, Mexico and Venezuela	Regional	Binding	Adopted
1994	APEC Non-Binding Investment Principles	APEC	Regional	Non-binding	Adopted
1994	Trade and Investment Agreement between the Government of Australia and the Government of the United Mexican States	Australia - Mexico	Bilateral	Binding	Adopted
1994	Energy Charter Treaty	European Energy Charter Organization	Regional	Binding	Adopt
1995	Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part	EC - MERCOSUR	Interregional	Binding	Adopted
1995	ASEAN Framework Agreement on Services	ASEAN	Regional	Binding	Adopted
1995	Osaka Action Agenda on Implementation of the Bogor Declaration	APEC	Regional	Non-binding	Adopted
1996	Protocol to amend the 1987 Agreement among ASEAN Member Countries for the Promotion and Protection of Investments	ASEAN	Regional	Binding	Adopted
1996	Protocol on the Protection of Competition of MERCOSUR	MERCOSUR	Regional	Binding	Adopted
1996	Inter-American Convention Against Corruption	Organization of American States	Regional	Binding	Adopted
1996	Acuerdo de Complementación Económica MERCOSUR - Chile	Chile - MERCOSUR	Regional	Binding	Adopted
1996	Canada - Chile Free Trade Agreement	Canada - Chile	Bilateral	Binding	Adopted
1997	Free Trade Agreement between Mexico and Nicaragua	Mexico - Nicaragua	Bilateral	Binding	Adopted

1997	Protocol Amending the Treaty Establishing the Caribbean Community. Protocol II: Establishment, Services, Capital	Caribbean Community	Regional	Binding	Adopted
1997	Resolution (97) 24 on the Twenty Guiding Principles for the Fight Against Corruption	Council of Europe	Regional	Non-binding	Adopted
1998	Agreement Establishing the Free Trade Area between the Caribbean Community and the Dominican Republic	Caribbean Community - Dominican Republic	Regional	Binding	Adopted
1998	Free Trade Agreement between Chile and Mexico	Chile - Mexico	Bilateral	Binding	Adopted
1998	Decision 439: General Framework of Principles and Rules for Liberalizing the Trade in Services in the Andean Community	Andean Community	Regional	Binding	Adopted
1998	Protocol Amending the Treaty Establishing the Caribbean Community. Protocol III: Industrial Policy	Caribbean Community	Regional	Binding	Adopted
1998	Framework Agreement on the ASEAN Investment Area	ASEAN	Regional	Binding	Adopted
1998	Trade and Investment Cooperation Arrangement between Canada and MERCOSUR	Canada and MERCOSUR	Regional	Binding	Adopted
1998	Memorandum of Understanding on Trade and Investment between the Governments of Canada, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua	Canada and Central American countries	Regional	Non-binding	Adopted
1998	OECD Council Recommendation on Counteracting Harmful Tax Competition	OECD	Regional	Non-binding	Adopted
1998	OECD Council Recommendation Concerning Effective Action Against Hard Core Cartels	OECD	Regional	Non-binding	Adopted
1998	Draft Multilateral Agreement on Investment	OECD	Regional	Binding	Not adopted
1999	Resolution of the European Parliament on European Union Standards for European Enterprises Operating in Developing Countries: towards a European Code of Conduct	European Parliament	Regional	Non-binding	Adopted

1999	Criminal Law Convention on Corruption	Council of Europe	Regional	Binding	Adopted
1999	OECD Principles of Corporate Governance	OECD	Regional	Non-binding	Approved
1999	Civil Law Convention on Corruption	Council of Europe	Regional	Binding	Adopted
1999	Treaty Establishing the East African Community	East African Community	Regional	Binding	Adopted
1999	Free Trade Agreement between the Governments of Central America and the Government of the Republic of Chile	Chile - Central American countries	Regional	Binding	Adopted
1999	Short-Term Measures to Enhance ASEAN Investment Climate	ASEAN	Regional	Binding	Adopted
2000	Free Trade Agreement between Mexico, El Salvador, Guatemala and Honduras	Northern Triangle	Regional	Binding	Adopted
2000	Revised OECD Declaration on International Investment and Multilateral Enterprises including the Revised Guidelines for Multinational Enterprises	OECD	Regional	Binding non-binding	Adopted
2000	Agreement between New Zealand and Singapore on Closer Economic and Partnership	New Zealand - Singapore	Bilateral	Binding	Adopted
2000	Protocol VIII: Competition Policy, Consumer Protection, Dumping and Subsidies amending the Treaty of Chaguaramas	Caribbean Community	Regional	Binding	Adopted
2000	Revised Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part	African, Caribbean and Pacific countries - European community	Regional	Binding	Adopted
2000	Tratado Sobre Inversion y Comercio de Servicios entre las Repúblicas de Costa Rica, El Salvador, Guatemala, Honduras y Nicaragua	Central American countries	Regional	Binding	Adopted
2001	European Convention on the Legal Protection of Services Based on, or Consisting of Conditional Access	Council of Europe	Regional	Binding	Adopted

2001	Additional Protocol to the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data Regarding Supervisory Authorities and Transborder Data Flows	Council of Europe	Regional	Binding	Adopted
2001	Convention Establishing the European Free Trade Association (Amendment)	EFTA	Regional	Binding	Adopted
2001	Protocol to Amend the Framework Agreement on the ASEAN Investment Area	ASEAN	Regional	Binding	Adopted
2001	Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy	Caribbean Community	Regional	Binding	Adopted
2001	Free Trade Agreement between the Government of Canada and the Government of the Republic of Costa Rica	Canada - Costa Rica	Bilateral	Binding	Adopted
2002	Agreement between Japan and theRepublic of Singapore for a New-ge Economic Partnership (JSEPA)	Japan - Singapore	Bilateral	Binding	Adopted
2002	Tratado de Libre Comercio entre Centroamérica y Panamá	Panama - Central American countries	Regional	Binding	Adopted

Source: UNCTAD. The instruments listed here are reproduced in whole or in part in UNCTAD, *International Investment Instruments: A Compendium*, vols. I, II, III, IV, V, VI, VII and VIII (United Nations publications, sales nos. E.96.II.A.9.10.11, E.00.II.D.13. 14, E.01.II.D.34, and forthcoming).

[a] The list includes bilateral free trade agreements containing investment provisions. BITs and double taxation treaties are not included in this table. For an up-to-date list of BITs, as of 1 January 2000, see *UNCTAD (2000a)*. The list of bilateral association, partnership and cooperation agreements signed by the European Community, by the European Free Trade Association, by the United States and by Canada with third countries, containing investment provisions, is to be found in the appendix.

[b] Dates given relate to original adoption. Subsequent revisions of instruments are not included, unless explicitly stated.

[c] The OECD Declaration on International Investment and Multinational Enterprises is a political undertaking supported by legally binding Decisions of the Council. The Guidelines on Multinational Enterprises are non-binding standards.

Appendix. Bilateral association, cooperation, framework and partnership agreements, that include investment-related provisions, signed by the European Community, by the European Free Trade Association, by the United States and by Canada with third countries (April 2002)

Country/territory/group of countries	Date of signature	Date of entry into force
European Community and its member States		
Malta	5 December 1970	1 April 1971
Jordan	18 January 1977	1 January 1979
Syrian Arab Republic	18 January 1977	1 January 1978
Lebanon	3 May 1977	1 November 1978
China	21 May 1985	1 October 1985
Pakistan	23 July 1985	1 May 1986
Argentina	2 April 1990	...
Uruguay	4 November 1991	1 January 1994
Hungary	16 December 1991	1 February 1994
Poland	19 September 1989[a]	...
Poland	16 December 1991	1 February 1994
San Marino	16 December 1991	Not yet in force
Albania	11 May 1992	1 December 1992
Mongolia	16 June 1992	1 March 1993
Brazil	26 June 1992	1 November 1995
Macao	5 June 1992	Not yet in force
Romania	22 October 1990[a]	...
Romania	February 1993	1 February 1995
Czechoslovakia	16 December 1991[a]	...
Czech Republic	4 October 1993	1 February 1995
Bulgaria	May 1990[a]	...
Bulgaria	8 March 1993	1 February 1995
Slovakia	4 October 1993	1 February 1993
India	23 June 1981[a]	...
India	20 December 1993	1 August 1994
Ukraine	14 June 1994	1 March 1998
Soviet Union	8 December 1989[a]	
Russian Federation	24 June 1994	1 December 1997
Sri Lanka	2 July 1975[a]	
Sri Lanka	18 July 1994	2nd trimester 1995
Republic of Moldova	28 November 1994	1 July 1998
Kazakhstan	23 January 1995	1 July 1999
Kyrgyzstan	9 February 1995	1 July 1999
Belarus	6 March 1995	Not yet in force
Turkey	12 September 1963[a]	1 December 1964
Turkey	6 March 1995	Not yet in force
Latvia	11 May 1992[a]	1 February 1993
Latvia	12 June 1995	1 February 1998
Lithuania	11 May 1992[a]	1 February 1993
Lithuania	12 June 1995	1 February 1998

Country/territory/group of countries	Date of signature	Date of entry into force
European Community and its member States		
Estonia	11 May 1992[a]	1 March 1993
Estonia	12 June 1995	1 February 1998
Tunisia	25 April 1976[a]	1 November 1978
Tunisia	17 July 1995	1 March 1998
Viet Nam	17 July 1995	1 June 1996
Israel	11 May 1975	1 July 1975
Israel	20 November 1995	... June 2000
Nepal	20 November 1995	1 June 1996
Morocco	27 April 1976	1 November 1978
Morocco	26 February 1996	...
Armenia	22 April 1996	1 July 1999
Azerbaijan	22 April 1996	1 July 1999
Georgia	22 April 1996	1 July 1999
Slovenia	5 April 1993	1 September 1993
Slovenia	10 June 1996	1 February 1999
Chile	21 June 1996	1 February 1999
Uzbekistan	21 June 1996	Not yet in force
Republic of Korea	28 October 1996	...
Cambodia	29 April 1996	1 November 1999
Lao People's Democratic Republic	19 April 1997	1 December 1997
The Former Yugoslav Republic of Macedonia	29 April 1997	1 January 1998
Turkmenistan	25 May 1998	Not yet in force
South Africa	11 October 1999	Not yet in force
Mexico	26 April 1991	1 November 1991
Mexico	8 December 1997	1 January 2000
Mexico	27 February 2001	1 March 2001
Egypt	18 January 1977	1 January 1979
Egypt	30 April 2001	...
Algeria	26 April 1976	1 January 1978
Algeria	22 April 2002	...
European Free Trade Association and its member States		
Turkey	10 December 1991	1 April 1992
Israel	17 September 1992	1 January 1992
Poland	10 December 1992	1 September 1993
Romania	10 December 1992	1 May 1993
Bulgaria	29 March 1993	1 July 1993
Hungary	29 March 1993	1 October 1993
Czech Republic	20 March 1992	1 July 1992[b]
Slovak Republic	20 March 1992	1 July 1992[b]
Slovenia	13 June 1995	1 September 1998
Estonia		1 October 1997
Latvia	7 December 1995	1 June 1996
Lithuania	7 December 1995	1 January 1997
Morocco	19 June 1997	1 December 1999
Palestinian Authority	30 November 1998	1 July 1999

Country/territory/group of countries	Date of signature	Date of entry into force
The Former Yugoslav Republic of Macedonia	19 June 2000	1 January 2001
Mexico	27 November 2000	...
Croatia	21 June 2001	...
Jordan	21 June 2001	...
United States		
Morocco	18 February 1985	...
Egypt	1 July 1999	1 July 1999
Egypt[c]	1 July 1999	1 July 1999
Ghana	26 February 1999	26 February 1999
South Africa	18 February 1999	18 February 1999
Turkey	29 September 1999	11 February 2000
Jordan	24 October 2000	24 October 2000
Nigeria	16 February 2000	16 February 2000
Viet Nam	13 July 2000	...
Canada		
Australia	15 November 1995	...
Norway	3 December 1997	...
Switzerland	9 December 1997	...
Iceland	24 March 1998	...
MERCOSUR	16 June 1998	...
South Africa	24 September 1998	...
Andean Community	31 May 1999	...

Source: UNCTAD.

... Information not available.

[a] No longer in force.

[b] Signed with the former CSFR on 20 March 1992. Protocols of the succession of the Czech Republic and the Slovak Republic were signed and entered into force on 19 April 1993 simultaneously.

[c] Investment Incentive Agreement between the Government of the United States and the Government of the Arab Republic of Egypt.

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REPORT OF THE EXPERT MEETING ON EXPERIENCES WITH BILATERAL AND REGIONAL APPROACHES TO MULTILATERAL COOPERATION IN THE AREA OF LONG-TERM CROSS-BORDER INVESTMENT, PARTICULARLY FOREIGN DIRECT INVESTMENT

Held at the Palais des Nations, Geneva
12 to 14 June 2002

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Chapter I

CHAIRPERSON'S SUMMARY

A. Salient points

1. Experts had a rich, interesting and fruitful debate on the subjects under consideration. In accordance with the guidelines for the functioning of the UNCTAD intergovernmental machinery arising out of the Mid-term Review, the following reflects "the substantive dialogue among experts from all parts of the world and general points of agreement with a view to building consensus on the issue".[1]

2. The main common elements in many bilateral investment treaties (BITs) and regional integration agreements (RIAs) are:

- Preamble (aims and purposes);
- Scope and definition (investment, investor, territory);
- Treatment standards (national treatment, most-favoured-nation (MFN) treatment, fair and equitable treatment, full protection and security);
- Taking of property (direct/indirect taking, compensation upon expropriation);
- Transfer of funds (inward/outward);
- Dispute settlement (consultation, conciliation and arbitration);
- Subrogation (investment insurance);
- Final clauses.

3. It was pointed out, however, that common elements reveal a variety of approaches with regard to their specific content.

4. The main different elements in many BITs and RIAs are:

- Definitions (portfolio included or not; investor definition);
- Treatment standards (coverage of pre- or post-entry);
- Provision on performance requirements (addressed or not; linkage to advantages);
- Takings (inclusion of regulatory takings);
- Transfer of funds (balance of payments and other exceptions);
- Dispute settlement (how the investor–State relationship is handled);
- Development provisions (reservations, temporary derogations, waivers, exceptions, transition periods, etc.);
- Transparency;
- Institutional mechanisms (monitoring, review, revision).

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[1] "Guidelines for the functioning of the UNCTAD intergovernmental machinery", TD/B(S-XIX)/4, paragraph 13.

5. Development-related considerations that could be borne in mind when formulating IIAs are the following:

(a) Every treaty provision could reflect development concerns, be tailored to the needs of the participating parties, and in particular reflect the asymmetries between countries. In addition, every treaty could reflect real-life economic, social and political considerations and avoid falling into the trap of ideological polarization;

(b) Flexibility considerations, and means to address development are important: positive- or negative-list approaches, or combinations thereof, gradual liberalization approaches, reservations, exceptions, temporary derogations, transitional arrangements, institutional monitoring mechanisms and peer-review processes;

(c) The content of international investment agreements (IIAs) needs to relate to contemporary interpretations of the concept of development, for example provisions on the right to development, and, more generally, to take account, where feasible, of other agreements and initiatives in related areas;

(d) Development concerns could be reflected in specific treaty provisions, for example:

(i) The objectives of treaties, as stated in the preamble;

(ii) Definitions, with exceptions based on considerations with regard to the desired legal form of investment, the size of investment, its timing and its nature (in particular, short-term capital flows of a speculative nature should be excluded);

(iii) Treatment standards, with possible inversions based on exceptions aimed at protecting local entrepreneurs or specific sectors; postponements of applicability; granting of special privileges; preferential treatments on the basis of ethnic considerations;

(iv) Transfer-of-funds provisions, with exceptions, temporary suspensions and/or derogations;

(v) Dispute settlement provisions, with possible exclusions with regard to the environment, taxation issues and prudential norms;

(vi) Monitoring mechanisms, enabling the dynamic and continuous evolution of treaty provisions and their interpretation in the context of development considerations;

(vii) Provisions on informal procedures for discussing investment questions and treaty interpretation (reference to the NAFTA Free Trade Commission and its Notes of Interpretation, and informal negotiations at the OECD);

(e) Of particular importance is the principle of special and differential treatment and its possible applicability to IIAs through, for example:

(i) Scope and definition, and possible exclusions from coverage based on the size of the economies involved and other economic considerations;

(ii) Treatment, and possible exemptions for countries based on the regional economic integration organization (REIO) principle and economic considerations;

(iii) The permitted use of performance requirements insofar as they are compatible with existing WTO rules;

(iv) General exceptions in the light of national development objectives, especially for small and medium-sized enterprises;

(v) Dispute settlement provisions that allow States access to technical assistance to pursue cases, and special funds to finance the legal costs incurred by States in that connection;

(vi) Coupling of regulations with technical assistance means to achieve standards;

(f) Transitional arrangements could be based on objective criteria, not on arbitrary time limits;

(g) Technical assistance measures addressing inequalities in negotiation capacity, both technical and economic in nature, could be required.

6. In addition, the following salient points were discussed:

(a) Treaties' possible reflection of sovereign rights to regulate entry and establishment and their relationship to market access and establishment issues;

(b) Treaties' possible reflection of the potential tension between liberalization goals and protectionist tendencies;

(c) The importance of transparency for the effective conduct of international business, the accountability of business and the attractiveness of host countries as locations for foreign direct investment;

(d) Bilateral/regional/multilateral levels of regulation: benefits and difficulties with each; and the question of compatibility in the light of overlapping obligations and free-rider problems posed by MFN clauses;

(e) Regional agreements and the scope of harmonization of substantive treaty provisions such as incentives or positions vis-à-vis third parties;

(f) The relationship between the legal and economic interpretation of issues as a guide to the formulation of specific treaty provisions;

(g) Interpretation of treaty provisions in the light of recent treaty application experience, and the need to adapt traditional concepts to changing circumstances;

(h) The broader issue of what constitutes development in the context of liberalization in general, and IIAs in particular;

(i) Inequalities in negotiation capacity, both technical and economic;

(j) The need to see IIA treaty making also in the broader context of the evolution of the international economic system, and in particular the problems posed by the heavy debt burden of a number of developing countries, the continuous need for official development assistance and the international financial system.

B. Summary of discussions

7. The discussions of the expert meeting on agenda item 3 were structured in accordance with the following three themes:

(a) Common elements in bilateral investment treaties and regional integration agreements;

(b) Different elements in bilateral investment treaties and regional integration agreements; and

(c) Issues related to the development dimension.

8. In his opening address, the Director of the Division on Investment, Technology and Enterprise Development stressed that the convening of the expert meeting responded to the two challenges posed by the pursuit of the UNCTAD mandate and the mandate arising out of the Fourth Ministerial Meeting of the WTO. In this context he recalled the earlier cycle of expert meetings on the "development-friendliness" of international investment agreements (IIAs). He said that in accordance with the Mid-term Review's "Guidelines for the functioning of the UNCTAD intergovernmental machinery" the outcome of the meeting would take the form of a chairperson's summary that would, where feasible, indicate areas of

consensus and concern. He emphasized his hope that this new flexible and unconstrained format would lend itself to discussion of the possible contents, formulation and implementation of development-related provisions in IIAs. He stressed that at a time when the international community was discussing an international framework on foreign investment it was of crucial importance to reflect on the need to ensure that investment rules take development concerns into account. At the same time, new issues that might affect both the protection and the promotion of investment and investors, and the development concerns and priorities of the communities in which they operated, should be addressed.

9. In his introduction to agenda item 3, the Chief of the Investment Policies and Capacity-building Branch of the Division on Investment, Technology and Enterprise Development stressed that international rule-making on investment was multifaceted and spanned the bilateral, regional, interregional and multilateral levels. At the end of 2001 the universe of international rules and norms for foreign investment encompassed more than 2,000 bilateral investment treaties (BITs), some 2,100 double taxation treaties and more than 140 regional integration agreements (RIAs) involving in one form or the other almost all the countries of the world. These instruments came in a variety of forms, ranging from binding to voluntary instruments or combinations thereof, and with a varying degree of commitments. In all, they had created an intricate and complex web of overlapping commitments and obligations. He reiterated that one of the objectives of the expert meeting would be to provide a structured overview of this complexity by way of highlighting the elements common to most of these instruments, identifying the main areas of divergence, and indicating whether these similarities and differences had changed over the past five to six years, and, if so, how. In addition, he said that the meeting ought to help the secretariat clarify in what manner the issue of development had found its expression in these international instruments.

10. The content of BITs had become increasingly standardized over the years, and their main provisions typically dealt with the scope and definition of foreign investment; admission of investments; national and most-favoured-nation (MFN) treatment and/or fair and equitable treatment; guarantees and compensation in respect of expropriation; guarantees of free transfer of funds; and dispute-settlement provisions, both State-to-State and investor-to-State. The main differences lay in the formulations on admission and entry of investment, promotion of investment, general standards of treatment and performance requirements. Differences could also be found in provisions dealing with the scope and range of qualifications and exceptions to the standards of national and MFN treatment, the standards for compensation upon nationalization, balance-of-payments exceptions regarding the transfer of funds, and the requirement for exhaustion of local remedies in the case of investor–State dispute settlement.

11. With regard to regional instruments on investment, a large number of these would include investment provisions, as did several other trade agreements that did not aim specifically at investment integration. Only a few regional instruments were entirely devoted to investment, however. He stressed that the commonality across regional instruments was much less obvious than in BITs. RIAs oriented towards investment protection tended to have broad and inclusive definitions. Instruments oriented towards liberalization at times used

relatively narrower definitions of investment, in the light of the differences between foreign direct investment and other kinds of international transactions. Formulations on investment promotion could be found in several RIAs, although the relevant provisions tended to be weak and general in nature. Many RIAs now provided for both MFN and national treatment but only post-entry. A large number of RIAs included provisions on free transfers of funds related to investments. Similarly, the issue of balance-of-payments difficulties was addressed in a growing number of RIAs. Some RIAs provided for the possibility of settling disputes by means of consultation and negotiation, whereas others provided for consultation through a body entrusted with the monitoring and implementation of the specific agreement. Similarly, the issue of entry and establishment of investment in RIAs would reveal a variety of approaches. RIAs also tended to differ in their provisions with regard to performance requirements.

12. With regard to development-related provisions, he stressed that the specific development content of BITs remained very limited. Their major role in this respect would lie in the contribution they could make to securing a welcoming and stable environment for foreign investment, while at the same time allowing rather wide latitude for developing countries to pursue their individual policy objectives. Hence, BITs facilitated investment and through this means they might have a positive impact on development. However, as current practice stood, they appeared in general not to contain specific provisions tackling development issues. By contrast, some RIAs had explicitly adopted development-oriented provisions. As was the case with the vast majority of international agreements, RIAs also contained various exceptions, safeguards and transition periods that were intended to cater for the different objectives and needs of parties at different levels of development. These qualifications might apply to all substantive provisions and have a particular importance with regard to the standard of treatment, both pre- and post-entry. A special category of exceptions also affected the repatriation of funds.

13. In closing, he reiterated that the trends of recent years showed that current practice in BITs and RIAs, though not expressly dealing with development matters, was by no means wholly incompatible with such concerns. A clarification of the interrelationship between existing standards of investor protection and investment promotion and the best means by which development concerns could be expressed in the evolution of those standards would therefore be needed.

14. The session began with presentations by the two resource persons. On the issue of common elements, Professor M. Sornarajah of the National University of Singapore stressed the similarities in BITs and RIAs insofar as their external structure and frameworks were concerned. Nearly all agreements would have preambles that made reference to the mutual benefit that all the parties to an agreement should derive from the agreement in question – including a reference to the mutuality of flows which in and by itself would be an inexact formulation in the light of the single-dimensional direction of investment flows from capital-exporting to capital-importing countries. This would usually be followed by provisions on definitions as to the coverage of the agreement, with some treaties under review confining themselves to a narrow approach (excluding foreign portfolio investment, for example), and

provisions on treatment issues. Here, the general commonality would extend to the granting of national treatment and MFN treatment, although each treaty would include a number of exemptions brought forward by a variety of means. The issue of fair and equitable treatment was common to most treaties, but constituted "uncharted" territory in terms of the interpretation of this standard in the light of references to international minimum standards. Similarly, most treaties dealt with the issue of taking of property, which in recent treaty practice referred increasingly to the issue of indirect takings in addition to the matter of direct expropriations, which were of less importance in the current economic climate. In this context, treaty references to acts equivalent to a taking revealed a great variety of differences. (In particular, the NAFTA context revealed a number of problems/difficulties with this approach.) Treaties also commonly dealt with the issue of compensation, usually with references to its promptness, adequacy and effectiveness, and indicated parameters such as public purpose, non-discriminatory nature and due process. A related issue in this context was subrogation, which also figured in most IIAs. In addition, BITs and RIAs addressed issues related to repatriation of funds, and matters related to settlement of disputes between States. Investor–State dispute settlement was also addressed. Although this was not common in all agreements, as it touched on status questions that involved recognizing rights of investors and extending provisions on remedies to non-State actors, it revealed some convergence, for example insofar as exhaustion of local remedies was concerned. Common to all State-to-State provisions was a reference to arbitration. Finally, all agreements had termination clauses.

15. The second resource person, Professor P. Muchlinski of the Kent Law School, University of Kent, United Kingdom, in referring to the traditional commonality of instruments, added that there was a need to think about the balance between the right to regulate on the one hand and the need to open markets on the other. He stressed the importance of expanding the reference base for considering treaty provisions, and also of including current international practice in other areas. With regard to dispute-settlement provisions, he pointed to the need for provision of adequate assistance to developing countries in the pursuit of dispute-settlement cases and in the related consultation and arbitration processes.

16. In the subsequent discussion, the following points were made:

(a) Experts pointed to the continuous evolution of concepts in BITs and RIAs as a reflection of the growing involvement of developing countries in the investment protection and promotion process, and the growing complexity of economic issues that needed to be addressed. In this context, they stressed the need to allow for the adaptability of traditional standards to economic reality and modern business practices, especially those relating to the mode of entry and establishment and post-entry operations.

(b) Several experts drew attention to the need to draw lessons from the BIT and RIA experience, including best practices, for the multilateral context, and,

more generally, the overall role of BITs in the light of the proliferation of regional and multilateral approaches.

(c) Experts stressed that treaties could and did reflect sovereign rights to regulate entry and establishment and their relationship to market access and establishment issues. In addition, treaties could reflect the possible tension between liberalization goals and protectionist tendencies.

(d) With regard to provisions related to the definition of investment, inclusion of foreign portfolio investment could lead to uncertainty as to the persons or entities upon whom treaty rights were conferred. At the same time, it was pointed out that the scope of definition provisions would need to reflect economic reality. In this context, some experts suggested that care would need to be taken to avoid any unwarranted differential treatment between different types of investment, for example through the exclusion of foreign portfolio investment from the definition of covered investments.

(e) With regard to provisions on transparency, experts indicated it was necessary to offer certainty and predictability to investors through the open availability of information concerning investment laws, rules and regulations, and administrative procedures, so as to avoid unnecessary surprise for investors in their interaction with host countries. It was also pointed out that transparency was important for the accountability of business and government. In this context, questions were raised with regard to the necessary scope of transparency provisions, especially in the light of their technical feasibility in developing countries.

(f) In the discussion on provisions dealing with takings, especially regulatory takings, the point was made that an ordinary breach of contract would not normally constitute a breach of international agreements, as these concerned only actions – or lack thereof – by Governments affecting investor rights.

(g) Some experts referred to the need to monitor treaty experience, especially with regard to provisions related to the issue of indirect takings and the growing extent to which these were being utilized. This would also extend to provisions on fair and equitable treatment and their subsequent interpretation in treaty practice. Subsequent disputes arising out of these two issues would place a considerable burden on the resources (both financial and technical) available to developing countries. The development of a case history would be useful in this context.

(h) It was pointed out that the definition of investment disputes would have to reflect economic complexities that would not only require a flexible approach based on functional analysis, but also emphasize the importance of a case-specific approach and consultative mechanisms.

(i) With regard to provisions dealing with investor–State dispute settlement, numerous references were made to ongoing discussions and negotiations in the Western Hemisphere. Among others, these raised – in a number of instances – questions related to the constitutionality of such provisions, wherein the granting of a more favourable treatment to foreign investors (i.e. access to international arbitration) than to domestic investors could be seen as unconstitutional. In addition, questions relating to the "democratic deficit" in international rule-making in this area were touched upon.

(j) It was also observed that traditional BIT practice, reflecting the unchanged functionality of these agreements, left no room for adaptation. Specially drafted model BITs appeared not to provide for sufficient flexibility to take into account specific developing country situations. There would thus be a need for the development of developing country BIT standards, coupled with the need for capacity building in this regard.

17. On the issue of differences in BITs and RIAs, the resource persons pointed particularly to the issue of entry and establishment of investment. A growing number of recent RIAs and BITs would aim at liberalizing the admission phase through the extension of provisions on MFN and national treatment to the pre-entry phase, often subject to sectoral and other exceptions in the form of opt-out (i.e. a negative-list or top-down approach as in NAFTA) or opt-in models (i.e. a positive-list or bottom-up approach as in the General Agreement on Trade in Services (GATS). Current BIT and RIA practice would also show differences in their provisions with regard to performance requirements, with some addressing them in detail. In addition, it was pointed out that the common elements in IIAs would reveal a variety of approaches with regard to their specific content. In particular, scope and definition varied with regard to extending treaty (protection) coverage to investors, ranging from approaches that included substantially all foreign assets to narrower definitions limiting treaty coverage to investments, through references to conformity with national laws and regulations, types and/or sizes of investments, and/or legal forms of incorporation that also addressed issues of control and ownership. This was further accentuated by references to the timing of investments and the duration of treaty coverage. Likewise, standard takings clauses showed a great variety of approaches, in particular as regards the issue of regulatory takings and prescribed exceptions and applications of these clauses. In the area of investor–State dispute settlement, most agreements would provide for automatic recourse to arbitration, whereas others would require prior exhaustion of local remedies and prior consultation. Similarly, while the issue of transfer of funds would commonly be addressed in the majority of IIAs, differences were apparent in several exceptions linked to record keeping, money laundering, court order infringements, and, more importantly, balance-of-payments difficulties.

18. In the subsequent discussion the following points were made:

(a) While the overall structure and format of BITs had largely remained unchanged over the years, their content revealed an evolution in relation to

several aspects, with differences particularly as regards treatment issues, transparency, investor–State dispute settlement, the question of performance requirements, and new issues such as environment and labour standards.

(b) Some experts noted that differences in approaches would reflect uncertainty regarding the interpretation of established terms. Recent treaty practice would illustrate this not only with regard to flexibility in approaches, but also with regard to a more cautious interpretation of standard clauses. Most revealing in this connection was the issue of takings and the related question of arbitrator inconsistency and the scope of arbitrator influence on the policy-making of the State in vital areas. Problematic in this context would be the recent experience with interpretation of treaty elements that went beyond the original intent of a treaty.

(c) Another case in point would be the compatibility problems arising out of the different levels of obligations enshrined in different treaties to which a State might be party. Most problematic in this respect would be the question of an extension of specific treaty provisions (and high standards) to non-treaty parties through MFN clauses, and the free-rider problems associated with this. In this context, reference was made to the applicability of the Vienna Convention and provisions found in a number of treaties referring to other obligations by contracting parties, as well as regional economic integration organization (REIO) clauses contained in several BITs and RIAs.

(d) With regard to the scope and applicability of treaty provisions, reference was made to possible combinations of top-down and bottom-up approaches. In future negotiations, this could raise issues related to the usefulness of the distinction between goods and services.

(e) Differences in treatment provisions would also reflect the difficulty of a uniform application of such standards in mixed-economy situations (i.e. economies consisting of State-owned, mixed and private enterprises). In this context, the issue of coverage of non-enterprise entities was also addressed.

(f) The point was made that voluntary instruments might seek to suggest higher standards (of liberalization) than might be possible in legally binding instruments.

(g) Finally, the question was raised whether the right to regulate would go beyond expropriation issues and cover performance requirements and other conditions imposed on foreign investors.

19. In his introduction to the issue of the development dimension of international investment agreements, the Director of the Division on Investment, Technology and Enterprise Development pointed to the underlying rationale for international treaty-making in

this area and ways and means by which development concerns could be and had been addressed in IIAs. The resource persons pointed to the overall context of development issues and their possible reflection in IIAs, providing an overview of the various means employed to address this issue, and also to the wider policy considerations that it raised.

20. In the subsequent discussion the following points were made:

(a) Every treaty provision could reflect development concerns, be tailored to the needs of the participating parties, and in particular reflect the asymmetries between countries. In addition, every treaty could reflect real-life economic, social and political considerations and avoid falling into the trap of ideological polarization.

(b) The point was also made that the content of IIAs needed to relate to contemporary interpretations of the concept of development, for example provisions on the right to development, and, more generally, to take account, where feasible, of other agreements and initiatives in related areas.

(c) Experts stressed the importance of flexibility considerations, and means to address development. These could include positive- or negative-list approaches, or combinations thereof, gradual liberalization approaches, reservations, exceptions, temporary derogations, transitional arrangements, institutionalized monitoring mechanisms and peer-review processes.

(d) It was also pointed out that flexibility of approaches could be achieved through procedural means (review bodies charged with monitoring treaty application) and review mechanisms. The practice in some RIAs of peer-review processes based on consultation, discussion and examination (so-called roll-back approaches) was cited as an example. In addition, treaty provisions could be made subject to reservations, exceptions and temporary derogations (in times of economic crises). In general, gradual liberalization and step-by-step approaches, in combination with strong processes, clear commitments to an ultimate objective and transparency obligations, could help in bridging the gap between liberalization goals and policy considerations aimed at preserving national sovereignty. The degree of regulation required for development would need to be addressed in this context.

(e) In addition, approaches embedded in wider contexts could allow for a more comprehensive approach to investment promotion. In this regard, reference was made to the fact that, generally, RIAs might cover not only liberalization of capital movements but also movements of labour, thus addressing economic asymmetry between capital-exporting developed countries and labour-exporting developing countries.

(f) With regard to specific treaty provisions, experts pointed out that development concerns could be reflected in a variety of ways. In particular, they could be reflected in the objectives of treaties, as stated in their preamble. Definitions could allow for exceptions based on considerations with regard to the desired legal form of investment, the size of investment, its timing and its nature. (In particular, short-term capital flows of a speculative nature should be excluded.) Standards of treatment could allow for possible inversions based on exceptions aimed at protecting local entrepreneurs or specific sectors; postponements of applicability; granting of special privileges; and preferential treatments on the basis of ethnic considerations. Transfer-of-funds provisions could have exceptions, temporary suspensions and/or derogations. Dispute settlement provisions could allow for possible exclusions with regard to the environment, taxation issues and prudential norms. Finally, the importance of monitoring mechanisms in this regard was stressed, insofar as they enabled the dynamic and continuous evolution of treaty provisions and their interpretation in the context of development considerations.

(g) With regard to development provisions, experts pointed to the NAFTA Free Trade Commission and its Notes of Interpretation, which provided directives on treaty interpretation. This would constitute an evolving approach that would focus not on renegotiation and reinterpretation of provisions, but rather on their elaboration in treaty practice. Such arrangements could well offer a model for the inclusion of development-related issues in treaty making. One expert pointed to the GATS as a possible model for the inclusion of development-friendly provisions.

(h) Experts also emphasized the importance of the principle of special and differential treatment of developing countries and its possible applicability to IIAs. This could take the form of possible exclusions regarding scope and definition based on the size of the economies involved and other economic considerations; possible exemptions from treatment standards based on the REIO principle and economic considerations; the permitted use of performance requirements insofar as they were compatible with existing WTO rules; general exceptions in the light of national development objectives, especially for small and medium-sized enterprises; dispute-settlement provisions that allowed States access to technical assistance to pursue cases, and special funds to finance the legal costs incurred by States in that connection; and the coupling of regulations with technical assistance means to achieve standards set by States.

(i) Transitional arrangements could be based on objective criteria, and not on arbitrary time limits.

(j) Some experts also stressed the importance of national preparedness to take advantage of treaty provisions, and the national capacity effectively to deal

with them both in technical terms – witness the difficulty with arbitration procedures of the International Centre for Settlement of Investment Disputes – and in substantive terms – witness the lack of economic capacity (industrialization etc.). In this context, questions were raised with regard to the possibility of increasing locational attractiveness through regional integration means, and the consequent issue of the scope of harmonization in such arrangements, ranging from common enterprise codes to incentive systems and positions vis-à-vis third parties.

(k) Although the protection of investments and investors in IIAs in itself contributed to the promotion of investment, promotion provisions in IIAs were relatively underdeveloped, and this led to the question of how to formulate concrete provisions in the light of the considerations involved in private sector investment decision-making. In this context, incentives and the efficient allocation of resources were cited as possible issues for consideration.

Chapter II

ORGANIZATIONAL MATTERS

A. Convening of the Expert Meeting

21. The Expert Meeting on Experiences with Bilateral and Regional Approaches to Multilateral Cooperation in the Area of Long-term Cross-border Investment, particularly Foreign Direct Investment was held at the Palais des Nations, Geneva, from 12 to 13 June 2002.

B. Election of officers

22. At its opening meeting, the Expert Meeting elected the following officers to serve on its bureau:

Chairperson:	Ms. Margaret Liang (Singapore)
Vice-Chairperson-cum-Rapporteur:	Mr. Marinus Sikkel (Netherlands)

C. Adoption of the agenda

(Agenda item 2)

23. At the same meeting, the Expert Meeting adopted the provisional agenda circulated in document TD/B/COM.2/EM.11/1. The agenda for the Meeting was thus as follows:

1. Election of officers
2. Adoption of the agenda
3. Experiences with bilateral and regional approaches to multilateral cooperation in the area of long-term cross-border investment, particularly foreign direct investment
4. Adoption of the report of the Meeting

D. Documentation

24. For its consideration of the substantive agenda item, the Expert Meeting had before it a note by the UNCTAD secretariat entitled "Experience with bilateral and regional approaches to multilateral cooperation in the area of long-term cross-border investment, particularly foreign direct investment" (TD/B/COM.2/EM.11/2).

E. Adoption of the report of the Meeting

(Agenda item 4)

25. At its closing meeting, the Expert Meeting authorized the Rapporteur to prepare the final report of the Meeting under the authority of the Chairperson.

Annex

ATTENDANCE *

1. Experts from the following States members of UNCTAD attended the Meeting:

Albania
Angola
Australia
Belarus
Benin
Botswana
Brazil
Burkina Faso
Canada
Central African Republic
Chile
China
Congo
Costa Rica
Croatia
Cuba
Czech Republic
Democratic Republic of the Congo
Ecuador
Egypt
Estonia
Ethiopia
Finland
France
Guinea
India
Indonesia
Iran (Islamic Republic of)
Italy
Japan
Kyrgyzstan
Malawi
Mauritius
Mexico
Morocco
Nepal
Netherlands
Nigeria
Norway
Oman
Pakistan
Peru
Qatar
Republic of Korea
Russian Federation
Senegal
Sierra Leone
Singapore
Spain
Switzerland
Thailand
Uganda
United Kingdom of Great Britain and Northern Ireland
United States of America
Zambia

* For the list of participants, see TD/B/COM.2/EM.11/INF.1.

2. The following intergovernmental organizations were represented at the Meeting:

Arab Labour Organization
Caribbean Community
Economic Cooperation Organization
European Free Trade Association
League of Arab States
Organisation for Economic Co-operation and Development
South Centre

Specially Invited

East African Community

3. The following specialized agency and related organization were represented at the Meeting:

United Nations Industrial Development Organization
World Trade Organization

4. The Economic and Social Commission for Western Asia and the International Trade Centre UNCTAD/WTO were represented at the Meeting.

5. The following non-governmental organizations were represented at the Meeting:

General Category

International Chamber of Commerce
World Wide Fund for Nature International

6. The following panellists attended the Meeting:

Mr. M. Sornarajah, Professor, National University of Singapore
Mr. Peter Muchlinski, Professor, Kent Law School, Canterbury, United Kingdom
Mr. Chung Tech Khov-Schild, Adjoint scientifique, SECO, Berne, Switzerland